YAP KOW & SONS SDN BHD

v.

HONGKONG TIN PLC

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[SUIT NO: S6-23-178-88]
7 SEPTEMBER 2001

TORT: *Negligence - Adjoining properties - Flooding of mine - Whether flooding caused by breaches at tailing retention bund - Whether tailing retention bund not properly maintained - Absence of channel at dump site - Whether a breach of statutory duty - Whether liability proved - Loss of profit - Special damages - Quantum*

The plaintiff and the defendant were the respective operators of two adjoining gravel pump mines. On or about 7 June 1983, the plaintiff discovered that the defendant's mine was full of water which was about to overflow onto the plaintiff's mine. The plaintiff warned the defendant of the situation whereupon the defendant promised to deal with the problem. The defendant, however, did nothing to remedy the situation. About a week later, on 14 June 1983, the tailing retention bund of the defendant's mine gave way with the result that water, slime and tailing sand flowed into and inundated the plaintiff's mine. The plaintiff alleged that the flooding was caused by the defendant's negligence, and breach of statutory duty, and in the circumstances sued the defendant for loss of profit and damages. It was not in dispute that the flooding had forced the plaintiff to close down its mine for about 2 1/2 months, and that some of the plaintiff's mining equipments and machineries were also damaged. Before the learned judge, the defendant denied any negligence, arguing in effect that the flooding was caused by the pond in the plaintiff's mine which had breached the bund at the common boundary. The primary issues that arose were: (i) whether the flooding was solely caused by breaches in the bunds of the tailing dumps of the defendant's mine; if so (ii) whether the plaintiff was entitled to RM500,000 loss of profit and RM930,000 special damages it had claimed for.

Held:

[1] Having assessed the evidence of the two experts herein, and in the light of the evidence of eye-witnesses, including SP4 who had given unchallenged evidence that he did not see the defendant doing anything to its tailing retention bund, and SP2 who testified that there was no

channel at the defendant's dumps as required by the defendant's Hydraulic Licence, the court is inclined to accept the evidence of the plaintiff as to how and why the flooding had occurred. (p 792 i)

[2] Clearly, the breach had occurred because the water level in the bund of the tailing dumps had gone up very high and because the said bund was not properly maintained by the defendant. It is clear too, that there was no merit in the defendant's contention that the flooding was caused by the collapse of the dividing bund at the common boundary, as the plaintiff was then mining at the eastern boundary. Further, the palong in question had not been in operation at the material time. On the facts, the plaintiff had thus proved its case on liability on the balance of probabilities. (pp 793 g-h & 794 c)

[3] The defendant's manager Lim Chan Fook was a material witness but was not called by the defendant to testify. No reason was given as to why he was not called. In the circumstances, the presumption under s. 114(g) of the Evidence Act 1950 must be invoked against the defendant. (p 793 c)

[4] Considering that the plaintiff was extracting 450 piculs of tin ore per month, that the nett price of tin at the material time was RM1,300 per picul, that it took 2 1/2 months for the plaintiff to rehabilitate its mine, and that, although the mine was not operating during the rehabilitation there was production by the plaintiff from tin ore stock and from tin ore processed from pebbles and unrefined ore, an award of RM250,000 for loss of profits is a fair figure. (p 795 b-f)

[5] In respect of special damages, the claim of RM300,000 as cost for removal of solids is reasonable. However, with regard to the additional claim of RM630,000, bearing in mind the volume of water to be drained and the extent of damage to the mine and the engines, a sum of RM487,500 is reasonable. Hence, RM787,500 is awarded to the plaintiff as special damages. (pp 795 g & 796 a)

[Judgment for the plaintiff. Order accordingly.]

Legislation referred to:
Evidence Act 1950, s. 114(g)

Other source(s) referred to:
Clerk & Lindsell on Torts, 16th edn, para 10-136
Sarkar, *Law of Evidence*, 15th edn, pp 862-863

For the plaintiff - Dato' NT Rajah (V Vijaya Segaran); M/s Maxwell, Kenion, Cowdy & Jones
For the defendant - Felix Dorairaj (Joseph Yeo); M/s Dorairaj, Low & Teh

Reported by WA Sharif

JUDGMENT

Mohd Noor Ahmad J:

1. The plaintiff claims against the defendant for loss and damages as a result of the flooding of its mine on 14 June 1983 caused by the negligence and/or breach of statutory duty imposed by the provisions of the mining enactment on the part of the defendant, its servants or agents.

2. Briefly, the undisputed facts are these:

(1) The defendant's mine was adjoining the plaintiff's mine. There were two palongs in the plaintiff's mine. The first palong was at the southern end whilst the second palong was at the northern end. On the day of the incident only the first palong was working. The second palong was not working for about two months prior to the incident and in the process of being relocated. The defendant had worked the land near the common boundary with the plaintiff's mine and with the plaintiff's consent stripped about two chains into the plaintiff's land. When the defendant finished mining at the common boundary, sometime in early 1982, the defendant built a bund at the common boundary up to the original level. In November 1982, the plaintiff started to mine at the common boundary.

(2) A week before the flooding the plaintiff's chief kepala (SP4) noticed that the defendant's mine was full of water and was about to overflow from the tailing retention bund at point marked X near breach 2 in ex. P30. He went with his manager to the defendant's kongsi to see the person in charge of the defendant's land, one Lim Chan Fook and told the latter about it. The three of them visited the scene and left after the latter said that he would deal with the problem.

3. The plaintiff alleged that when its mine was in operation, the tailing retention bunds of the defendant's mine gave way and broke down causing water, slime and tailing sand to flow into its mine, thereby flooding the mine. On the contrary, the defendant denied negligence on its part and asserted that the flooding was due to the collapse of the bund at the common boundary which was weakened by the mining activities of the plaintiff thereat.

4. (1) There are two versions as to how and why the flooding occurred. I have to decide which version is more probable in the light of the evidence adduced including documentary.

(2) The plaintiff's version was adduced by SP2, a mining consultant with vast experience in tin mining and engaged by the plaintif as its consultant since 1978 and who had visited the plaintiff's mines in the course of his work and therefore, was familiar with the locality and its vicinity. He visited the scene on the following day of the incident. According to his findings as illustrated by the plan prepared by him after the inspection (exh. P30) the cause of the flooding was solely due to breaches in the bunds of the tailing dumps of the gravel pump mines of the Defendant in the north. There were two breaches, (breach 1 and breach 2 in exh. P30). He opined that breach 1 occurred first because it was on a higher level and then followed by breach 2 and thereafter, the water, slime and tailing sand flowed southwards into the plaintiff's mine which was lower than breach 2. It was not possible that the flooding was caused by the water from the plaintiff's mine because originally there was no water in the area that was flooded except that there was a pond at the common boundary (circled in pen in exh. P30) caused by mining activities before the incident, which was also flooded after the incident. Further, the distance between breach 2 and the common boundary is about 528 feet and the distance between breach 2 and GP1 shaded in green in exh. P30 is more than four times that distance. There was nothing to indicate in any way that the plaintiff had caused the breaches. As to what had caused the breaches, he stated that there were many ways that a breach could occur, firstly, the water level in the bund of the tailing dumps must have gone up very high or secondly, the bund was not properly built or thirdly, the bund was not properly maintained. When cross-examined, he said that at the time of the inspection of the breaches he noticed that there was no channel at the defendant's dumps. When referred to exh. D31 by the learned defence counsel, he stated that the plan was the proposal to strip the plaintiff's land at the common boundary for the plaintiff to mine there. However, the plaintiff had not implemented it at the time when the breaches occurred. Before the incident the plaintiff was mining at the eastern boundary by gravel pump 1 (GP1). He confirmed this fact in the re-examination.

(3) The defendant's version was deposed by SDI who was a mining engineer and consultant of vast experience. He never visited the site but based his opinion on SP2's report (exh. P28) including the relevant plans and other reports put up by the defendant. According to him, the flooding happened when the bund at the common boundary breached causing water from the pond to rush southwards and thereby weakened the toe of the bund at breach 2 causing water from (L) in exh. P30 to rush out southwards. In consequence of the water rushing out from (L), the toe of the bund at breach 1 was weakened and

thereby causing the water in (U) to rush down southwards ((L) and (U) are the defendant's tailing dumps). His theory was based on these facts exh. P30 shows that in respect of breach 1 the level circling the breach one side is 15.53 and the other side shows 21.67 and with regard to breach 2 one side is 41.52 and the other side shows 57.97. The four figures show the level of the respective bunds. From these levels he concluded that breach 2 was higher than breach 1. There was a bund at the common boundary which held back the water in the defendant's land. This body of water was far away from the tailing area of the defendant. The plan (*re* 1kF@3) shows that in the normal mining operation the water from the lower pond (marked L) flows upwards into the upper pond (marked U). It tallies with the lower pond [marked (L)] and the upper pond [marked (U)] in exh. P30. The level at the lower pond is higher than at the upper pond. Therefore, he concluded that the water from the upper pond could not have caused breach 1 and flowed into the lower pond causing further breach at breach 2. He further concluded that before the breaches occurred the upper pond was at the lower level, however, after the breaches the position was reversed. In a nutshell, he opined that the cause of the flooding was due to the weakening of the toe of the dividing bund at the common boundary which collapsed, and the weakening of its toe could have been caused by the plaintiffs mining activities near the point marked GP in exh. P30 by means of gravel pump mining method in which a water jet was used to shoot at the mine face which caused instability to the mine face.

5. (1) It is trite law that evidence of an expert, like any other witness, has to be appreciated in accordance with law and accepted only if found to be trustworthy. He is entitled to testify based on observed data of his own or on data furnished by others, though he lacks personal knowledge of the incident. His opinion is not always binding on the court, and if accepted by the court it becomes the decision of the court and ceases to be an opinion evidence of the expert. Under the circumstances, his evidence also has to be interpreted like any other evidence. In so doing the effort should be made to explain the same correlated with evidence of eye-witness. It is only when that the two become irreconciable that the question of accepting one or the other arises and not otherwise (see *Sarkar's Law of Evidence*, 15th edn pp. 862-863).

(2) Having assessed the evidence of the two experts (SP2 and SD1) in the light of the evidence of eye-witnesses, I am inclined to accept the evidence of SP2 on how and why the flooding occurred, on the following grounds:

(a) SP4 testified that a week earlier he noticed that the defendant's mine was full of water and was about to overflow from the tailing retention bund at point marked X near breach 2 (exh. P30). With his manager he went to see Lim Chan Fook, the defendant's agent and told the latter about it. They visited the site with the agent and left after the agent promised to deal with the problem. Thereafter, he did not notice that the agent and his men did anything about it. He was not challenged on this point at all.

(b) Lim Chan Fook was not called by the defence to testify on this very material issue and no reason was given as to why he was not called. Therefore, it is justified for me to apply the presumption under s. 114(g) of the Evidence Act 1950 against the defendant.

(c) SP2, when cross-examined stated that when he inspected the breaches he noticed that there was no channel at the defendant's dumps. This fact was not seriously challenged nor evidence adduced by the defendant to rebut it or to explain why the channel was not provided for as required under condition 11 in the defendant's Hydraulic Licence. Therefore, the defendant was in breach of the condition.

(d) SP2 was never cross-examined on the facts relating to the contention of the defendant that the cause of the flooding was due to the collapse of the dividing bund at the common boundary and the reason for the weakening of the toe of the bund as deposed by SDI.

To my mind, grounds (a) and (b) lend weight to the opinion of SP2 who testified that one of the ways that the breach could occur was that the water level in the bund of the tailing dumps must have gone up very high. This is another breach of the condition in the defendant's Hydraulic Licence, that is to say, condition 10 which requires the freeboard of the tailings retention bunds shall not be less than one meter at all times. And ground (c), to a certain extent supports SP2's opinion that one of the ways that the breach could occur was that the bund was not properly maintained.

(3) 1 agree with the conclusion by SD1 that breach 2 was higher than breach 1 based on the four figures showing the level of the respective bunds as stated in para. 4(3) above and with his conclusion that the water from upper pond (U) could not have caused breach 1 and flowed into the lower pond (L) causing further breach at breach 2 because in the normal mining operation the water from the lower pond flowed upwards into the upper pond. This should be so because the plan exh. P30 showing the level of the contours speaks by itself. However, the conclusions do not affect my

belief that there was a breach at breach 2 and the water flowed southwards and the cause of that breach was by reason of grounds (a), (b) and (c) as stated in para. 5(2) above, that is to say, the water level in the bund of the tailing dump (L) must have gone up very high and that the bund was not properly maintained. What caused breach 1 only God knows. That does not matter because the plaintiff had proved the cause of the breach at breach 2 on the balance of probabilities.

(4) With regard to SD1's theory that the cause of the flooding was due to the collapse of the dividing bund at the common boundary by reason of the weakening of the toe of the bund by the plaintiff's mining activities thereat, I am of the view, that possibility is quite remote in the light of the evidence that (i) the second palong was not working for about two months prior to the incident, (ii) at that time the plaintiff was mining at the eastern boundary by gravel pump I (GP1) and (iii) the Plaintiff had not implemented its proposal to strip its land at the common boundary to mine there at the time when the breaches occurred. Furthermore, my findings on breach 2 outweighs SD1's theory.

6. Therefore, having regard to the totality of the evidence, I am satisfied that the plaintiff has proved its case on liability on the balance of probabilities.

7. In para. 6 of the statement of claim the plaintiff relied on the doctrine of *res ipsa loquitor*. To my mind, the doctrine does not apply in this case because the cause of the flooding is known (*re* para. 10-136 *Clerk & Lindsell on Torts*, 16th edn).

8. (1) With regarded to damages, it is well-settled that the plaintiff must prove it by credible evidence. From the reports made by SP2 (exh. P28 and P29) I am satisfied that the plaintiff's mine was damaged by the flooding. The statistics on the volume of slime, water and solids discharged and the recommendation to rehabilitate the mine contained in the reports had not been challenged. Therefore, they must be accepted.

(2) The plaintiff claims for loss of profits in the sum of RM500,000 and special damages in the sum of RM930,000 being the cost of removal of solids (RM300,000) and the cost of de-watering, building bunds/roads, loss of pipes/monitors, etc, repair of engines, fuel and lubricating oil, cost of purchase of pump shed, materials, replacing pump/upkeep of pipes, claim for salaries of contract workers (RM630,000).

(3) With regard to the claim for the loss of profits the plaintiff adduced evidence that it took about 2 1/2 months to rehabilitate the mine before commencing mining operations. However, for full mining operations to commence it took longer. Before the flooding it was extracting

about 450 piculs of tin ore per month. The price of tin at that time was about RMI,800.00 per picul gross and the nett price was about RM1,300.00 per picul. Therefore, the profit that it would have made during the 2 1/2 months was about RM500,000 nett. During the relevant time there was tin control to maintain the price of tin ore by the International Tin Control by way of quota imposed on the sale of tin. However, the plaintiff mined in excess of its quota and stored the same as the sale could only take place in accordance with the quota. Therefore, during the 2 1/2 months when the mine was being rehabilitated no tin ore could be extracted and stored which could be sold later. Details of mines production, sale and stocks from each palong were produced. It was confirmed that tin ore was stored in such a manner irrespective of the palongs from which the tin ore was extracted and that there was production of tin ore whilst the mine was being rehabilitated. This production was from the stock of tin ore and the tin ore processed from pebble and unrefined ore (re SP1, SP2 and exhs. P18A, P1813, P19AB, P25, P26AB, P27AB). On the evidence adduced I am satisfied that although the mine was not operating during the rehabilitation there was production by the Plaintiff from the stock of tin ore and the tin ore processed from pebble and unrefined ore and by reason thereof the plaintiff's stock had been depleted by the end of July 1983. It is evident that palong 2 was not in operation prior to the flooding and in the process of being resited, though already approved by the Mines Department. The plaintiff did not adduce credible evidence on how much longer it would take for the plaintiff to complete the resiting and to be operational had there been no flooding in order to enable me to determine a realistic figure for the loss of profits. Therefore, to simplify the calculation on this claim I award RM250,000 on the basis that palong 2 was not operating during rehabilitation.

(4) In respect of the special damages, on the evidence adduced I am satisfied that the claim of RM300,000 being the cost of removal of solids is reasonable. However, with regard to the claim of RM630,000 I have to take into account the following factors.

(a) the huge volume of water to be drained,

(b) the extensive damage to the mine caused by the flooding,

(c) the fact that the engines would still have to be repaired, maintained and/or replaced including wear and tear, the fuel and lubricating oil would still have to be consumed and certain number of manpower would still have to be engaged except for the extra workers engaged for de-watering, had there been no flooding.

Having so considered, I am of the view that, to simplify the calculation under this head, in the light of the evidence adduced a sum of RM487,500 (RM630,000 minus 25%) is reasonable.

9. Therefore, judgment is hereby entered against the defendant with costs as follows:

(1) loss of profits in the sum of RM250,000 with interest at the rate of 8% per annum from the date of service of the summons until full realisation,

(2) special damages in the sum of RM787,500 with interest at 4% per annum from 14 June 1983 until judgment and thereafter at 8% per annum until full realisation.

10. From the defendant's written submission I take it that the counter-claim had been abandoned. As such, I need not consider it.